IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 29TH NOVEMBER 2007 / 8TH AGRAHAYANA 1929

EFA.No. 52 of 2001

(*E.A.NO. 460 OF 1990 IN EP.96/1990 OF SUB COURT, MANJERI*
IN O.S. 100 OF 1989 of SUB COURT, KOZHIKODE-II)

APPELLANT/IST RESPONDENT/DECREE HOLDER:

JITHESH KUMAR S. SHAH,
PARTNER OF ANANDJI SHAH FIRM

BY ADV. SRI.P.S. SREEDHARAN PILLAI

RESPONDENTS/CLAIMANT AND 2ND RESPONDENT/JUDGMENT DEBTOR & THIRD PARTY:
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1. P. ALEEMA, D/O. PAYYANI MAMMAD MUSALIYAR,
AGED 49 YEARS, TIRUVALI P.O., PUNNAPPALA,
ERIYAD, MALAPPURAM DISTRICT.

2. M. YOOSUF, S/O. MACHINGAL MAMMI,
AGED 56 YEARS,
THIRUVALI, P.O. PUNNAPPALA,
MALAPPURAM DISTRICT.

BY ADV. SRI.K.M. SATHYANATHA MENON

THIS EXECUTION FIRST APPEAL HAVING COME UP FOR ADMISSION ON 29/11/2007, ALONG WITH CRP NO. 2627 OF 2001, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.T. SANKARAN, J.

E.F.A.No. 52 OF 2001

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C.R.P. 2627 OF 2001

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Dated this the 29th November, 2007

J U D G M E N T

The appellant Jitheshkumar S. Shah obtained a decree dated 24.10.1989 in O.S. No. 100 of 1989 on the file of the court of the Sub Judge, Kozhikode against Yoosuf for realisation of a sum of Rs. 41,118.77/- with interest . To execute the decree, the decree holder filed an Execution Petition before the Sub Court, Kozhikode on 30.08.1990. That Execution Petition was transferred to the Sub Court, Manjeri where it was re-numbered as E.P.No.96 of 1990. The prayer in the Execution Petition was to realise the decree amount by attachment and sale of the property belonging to the judgment debtor. On 14.09.1990, the property in dispute was attached.

2. On 26.10.1990, Aleema, the wife of the judgment debtor Yoosuf filed E.A.No.460 of 1990 under Rule 58 of Order XXI of the Code of Civil Procedure. It was contended by Aleema that the property which was attached was purchased by her as per a registered assignment deed dated 18.10.1976 (Ext.A1) and that the property belongs to her and not to her husband. Objections were filed by the decree holder, wherein he contended that though

the property stands in the name of wife, it really belongs to the husband Yoosuf and that the property was purchased with his funds. It was pointed out that there is a house in the property and that as per the records maintained by Thiruvali Grama Panchayath for the years 1982-83 to 86-87 and 1987 -88 to 1991-92, the building stands in the name of Yoosuf, the judgment debtor . The decree holder also contended that even assuming that the land belongs to the wife, it cannot be said that the building belongs to her. The decree holder contended that the building was constructed by the judgment debtor Yoosuf with his own funds.

3. The court below allowed E.A.No.460 of 1990 and ordered to lift the attachment. The court below held that at the time when the property was purchased by Aleema in the year 1976, it was not proved that her husband had incurred the expenditure for the purchase or that the property was purchased in the name of wife to ward off creditors or to screen away the property from being proceeded with for realisation of any decree against the judgment debtor. The consideration shown in the document is only Rs.800/-. The court below came to the conclusion that no material has been produced by the decree holder to show that in the year 1976, Aleema was not having sufficient funds to acquire

the property . No material was available before the court to come to the conclusion that the property was purchased with the funds of the husband, Yoosuf.

4. As far as the house is concerned, the court below held that it was constructed spending an amount of Rs.25,000/-. The evidence of P.W.1 was discussed by the court below. She stated in evidence that the funds were provided by her brother for construction of the house. The court below found fault with the claimant in not examining her brother to prove this fact, forgetting the fact that the burden of proof was on the decree holder to prove that the building was constructed not by the owner of the land. The court below relied on Ext. B1 certified extract of the building tax assessment register for the period from 1987-88 to 1991-92 and 1982-83 to 1986-87 and found that as per the records kept in the Panchayat, the name of the owner of the building is shown as Yoosuf and not Aleema. Based on that solitary piece of evidence, the court below came to the conclusion that the building belongs to to the judgment debtor/husband and not to his wife.

5. The court below thereafter considered the contention of the decree holder that if the building belongs to the husband, there was nothing wrong in

proceeding to attach the building and to sell the same in execution since the law available in India permits a person other than the owner of the land to have ownership over a building in that land. The decision reported in **AIR 1961 Kerala 147** ***(Mammunhi vs. Kunhibi)*** was relied on by the decree holder . The court below held that the Division Bench decision in ***AIR 1961 Kerala 147*** is not applicable to the facts of the present case. Learned counsel for the decree holder submits that this finding of the court below that the dictum laid down in ***AIR 1961 Kerala 147*** is not applicable to the present case is unsustainable. There is force in the contention raised by the petitioner/decree holder that the Division Bench decision was not properly appreciated and applied by the court below.

6. However, I need not render a finding on this question, since I am not inclined to accept the findings of the court below at paragraph 10 of the order that the building belongs to the judgment debtor, husband of the claimant. The order passed by the court below being in favour of the claimant, she could not have challenged the same in appeal. But when an appeal at the instance of the decree holder is considered, certainly, the respondent-claimant is entitled to challenge the correctness of any finding in the order impugned which goes

against her. Learned counsel, Shri K.M. Sathyanatha Menon attacks the findings of the trial court in paragraph 10 of the order impugned and submits that the court below was not justified in arriving at the conclusion that the building belongs to the judgment debtor/husband and that the said finding arrived at relying on Ext.B1 document alone, is illegal and unsustainable. I am of the view that the court below was not right in holding that the building belongs to the judgment debtor. There is no material to come to the conclusion that the funds of the judgment debtor were utilised for construction of the house. The discussion in paragraph 10 of the order indicates that the expenditure incurred for construction of the house was only Rs. 25,000/-. There is nothing to indicate that Aleema was not having sufficient funds for construction of the house. Her evidence that her brother provided funds for the construction of the house was negatived by the court below only on the ground that her brother was not examined. I do not think that the approach made by the court below was right. The question was whether there is anything on record to come to the conclusion that the building belongs to the judgment debtor. Except Ext.B1, where some entries are there showing the owner of the building as judgment debtor, there is no other material on record to come to the conclusion that

either the building was constructed by him or with his funds. Entries in the Panchayat records in respect of the building need not always be conclusive particularly in view of the relationship between the owner of the land and the person in whose name, the entries are made. Therefore, I hold that the finding of the court below that the building belongs to the judgment debtor is unsustainable.

7. In view of the finding that the building does not belong to the judgment debtor, I am of the view that it is not necessary to consider the question as to whether the finding of the court below in paragraph 11 of the impugned order is correct or not. When the land and the building do not belong to the judgment debtor and it is proved by the claimant that the property was purchased by her in the year 1976, thirteen years before the institution of the suit, the attachment effected in respect of the property in question is liable to be raised. The court below was fully justified in holding that E.A.No. 460 of 1990 is liable to be allowed. Therefore, though for different reasons, I confirm the order passed by the court below allowing E.A.No. 460 of 1990.

8. C.R.P.No. 2627 of 2001 is filed by the decree holder challenging the order dated 20.06.2001 in the Execution Petition. Following the order in

E.A.No. 460 of 1990, the court below had dismissed the Execution Petition. Since I have confirmed the order of the court below in E.A.No. 460 of 1990, necessarily, the order impugned in this revision is also liable to be confirmed and the Civil Revision Petition is therefore, liable to be dismissed.

Accordingly, the Execution First Appeal and the Civil Revision Petition are dismissed. No order as to costs.

K.T. SANKARAN,
JUDGE.

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K.T. SANKARAN, J.

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Dated this the 29th November, 2007

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